

NO. 74363-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

KARL PIERCE,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE DOUGLASS A. NORTH

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. SUPPLEMENTAL ISSUES PRESENTED

1. Whether the trial court commented on the evidence in issuing a limiting instruction where the instruction did not convey whether the court believed the testimony.

2. Whether WPIC 1.04 properly communicates the requirement that a unanimous verdict result from the jurors' common deliberations?

B. SUPPLEMENTAL ARGUMENT

1. THE TRIAL COURT DID NOT COMMENT ON THE EVIDENCE.

Pierce contends in his supplemental brief that the trial court made an unconstitutional comment on the evidence in giving a limiting instruction as to Hiram Warrington's testimony. This claim is without merit. The limiting instruction did not convey the trial court's attitude toward the evidence or the court's opinion of Warrington's credibility, and was not a comment on the evidence.

Hiram Warrington testified that he was well acquainted with Ramon Lyons and had lived in Lyons' house for a brief period in 2012, including at the time of Reed's death. RP 2759-60. He testified that Lyons had guns in the house and that he saw Lyons,

Barnes, Bienhoff and Pierce together in Barnes' car immediately prior to the shooting. RP 2763-77. He testified that Lyons had a gun with him at the time. RP 2763. He testified that he saw Lyons again at approximately two a.m. and that Lyons looked scared and told him "If anybody asks, I was home." RP 2781. As to the following testimony, it was admitted not for the truth of the matter asserted, but for the purpose of impeaching Lyons' credibility. RP 2783. Warrington testified that Lyons told him that he and the others had intended to rob Reed, that Bienhoff stated that he "had to shoot" Reed and that Pierce admitted to shooting at the other vehicle. RP 2783-88. Warrington also testified that, days later, he overheard Lyons ask Pierce if he had "got rid of everything," meaning weapons and clothes and Pierce responded that he had. RP 2791-92. At the defendant's request, the trial court instructed the jury that they could only consider the challenged evidence as evidence of Lyons' credibility. RP 2783. The court stated:

Testimony regarding any oral assertions made by Ray Lyons to Hiram Warrington may be considered by you only for the purpose of impeaching Ray Lyons' credibility.

RP 2783.

The parties had debated the proper wording of the limiting instruction. RP 2713. The trial court explicitly stated that "I don't want to be making a comment on the evidence." RP 2713. Pierce objected to the wording of the State's proposed limiting instruction. RP 2713-14, 2718. Bienhoff agreed to the wording that the State proposed for the limiting instruction, but wanted the word "alleged" be added as follows: "Testimony regarding any *alleged* oral assertions made by Ramon Lyons to Hiram Warrington may be considered by you only for the purpose of impeaching Ramon Lyons' credibility." RP 2714; CP 423. Defense counsel argued that without the word "alleged," the court was endorsing that the assertions were made, which the defendants disputed. RP 2721-22. The trial court concluded that wording of the State's proposed limiting instruction, "*any* oral assertions," was not a comment on the evidence because it did not instruct the jury that the assertions were made. RP 2722-23.

The Washington Constitution provides that, "judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." WASH. CONST. art. IV, § 16. A trial court violates this prohibition when it instructs the jury as to what weight to give certain evidence. "An impermissible comment is one which

conveys to the jury a judge's personal attitudes toward the merits of the case or allows the jury to infer from what the judge said or did not say that the judge personally believed or disbelieved the particular testimony in question." Hamilton v. Dept. of Labor and Indus., 111 Wn.2d 569, 571, 761 P.2d 618 (1988). Appellate courts review whether a jury instruction amounts to a comment on the evidence *de novo*. State v. Butler, 165 Wn. App. 820, 835, 269 P.3d 315 (2012).

In Hamilton, the trial court instructed the jury to give "special consideration" to the opinion of the plaintiff's attending physician. Id. at 570. On appeal, the state supreme court held that the instruction was not an unconstitutional comment on the evidence because it did not convey the personal opinion of the trial judge or say that the judge personally believed or disbelieved the testimony. Id. at 571.

In Moore v. Mayfair Tavern, Inc., 75 Wn.2d 401, 408, 451 P.2d 669 (1969), the trial court orally instructed the jury that a doctor's testimony about statements made to him by a patient should be considered not for the truth of the statement but as evidence that the statements were made. The state supreme court

rejected appellant's claim that the oral instruction was a comment on the evidence. The court explained:

When the court told the jury that it could consider the doctor's testimony as evidence that the statements were made, it was not passing upon the credibility of the doctor's testimony but was simply advising the jury concerning the limited purpose for which the evidence could be considered. Whether or not the doctor's testimony was to be believed was a question for the jury. The court expressed no appraisal of the truth or falsity of this testimony. A judge may refer to the evidence so long as he does not explain or criticize the evidence, or assert that a fact is proven thereby, and so long as the jury is made aware that the fact is for it to determine.

Id. at 409.

Likewise, in this case, the wording of the limiting instruction did not convey the trial court's personal opinion or tell the jury whether the court believed Warrington's testimony. Use of the phrase "testimony regarding any oral assertions" did not convey that the trial judge found Warrington credible. Indeed, it plainly left the jury to determine whether the oral assertions that Warrington testified to were in fact made.

Even if this bordered on a comment on the evidence, it was not prejudicial. When a trial court unconstitutionally comments on the evidence, reversal is not required if the State can show the defendant was not prejudiced. State v. Levy, 156 Wn.2d 709, 725,

132 P.3d 1076 (2006). The court's instruction was not prejudicial because the jury was instructed that it could only use Warrington's testimony about Lyons' assertion only for judging Lyons' credibility. Juries are presumed to follow instructions absent evidence to the contrary. State v. Dye, 178 Wn.2d 541, 556, 309 P.3d 1192 (2013). Interestingly, both the State and defense attempted to rely on Lyons' testimony for some matters, but argued he was not credible as to other matters.¹ Thus, Lyons' credibility was in some sense universally challenged, and was not central to the defense. Moreover, there was other strong evidence that Lyons was not entirely credible. Most notably, on cross-examination by the defendants, Lyons admitted that he initially denied knowing Barnes, Bienhoff or Pierce. RP 2606. There is no possibility that had the trial court used the phrase "any *alleged* oral assertions" instead of "any oral assertions" the outcome of the trial would have been different. See State v. Barry, 183 Wn.2d 297, 303, 352 P.3d 161 (2015).

¹ The State argued "We're not asking you to believe Ray Lyons. His story is rather ludicrous in light of all the evidence, right?" RP 3766. Similarly, Bienhoff argued that Lyons was one of the State's witnesses that "has difficulty with their credibility." RP 3839.

2. THE TRIAL COURT PROPERLY INSTRUCTED THE JURORS ON THE REQUIREMENT THAT ANY VERDICT BE THE UNANIMOUS RESULT OF COMMON DELIBERATIONS.

Pierce argues for the first time on appeal in his supplemental briefing that the trial court violated his constitutional right to a unanimous verdict by not specifically instructing the jurors that deliberations must involve all 12 jurors at all times. This claim should be rejected. The Washington State Supreme Court has already determined that WPIC 1.04, which was given in this case, is sufficient to apprise the jury of the need to deliberate together in the manner required by the constitutional right to a unanimous verdict.

At the start of trial, the court instructed the jury as suggested by WPIC 4.61, "Do not discuss this case among yourselves or with anyone else. Do not permit anyone to discuss it with you or in your presence." RP 1033. At the close of evidence, the court instructed the jury as set forth in WPIC 1.04, which states:

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon further review of the evidence and these

instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

CP 444. Pierce made no objection to this instruction, and did not propose any additional instructions to the jury regarding deliberations. RP 3726. At no point did Pierce request an instruction more specifically stating that deliberations must involve all 12 jurors at all times. There is no evidence in the record that the jury ever deliberated without all 12 jurors present. When polled, each member of the jury affirmed that the verdict announced was both the juror's individual verdict and the collective verdict of the jury. RP 3941.

Criminal defendants have a constitutional right to a unanimous verdict. WASH. CONST. art. I, § 21; State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). This requires not only that all 12 jurors reach the same ultimate verdict, but that they "reach their consensus through deliberations which are the common experience of all of them." State v. Lamar, 180 Wn.2d 576, 583-88, 327 P.3d 46 (2014) (quoting People v. Collins, 17 Cal.3d 687, 693, 552 P.2d 742 (1976)). For the first time on appeal, Pierce challenges the trial court's failure to explicitly instruct

the jury that deliberations must involve all 12 jurors at all times as a violation of his constitutional right to unanimity. In order to have a claim reviewed for the first time on appeal a defendant must demonstrate that the error is manifest, and of constitutional dimension. RAP 2.5(a)(3). A manifest error is an error that is unmistakable, evident or indisputable and that causes "actual prejudice" by having "practical and identifiable consequences in the trial of the case." State v. Kalebaugh, 183 Wn.2d 578, 584, 355 P.3d 253 (2015). The burden of demonstrating actual prejudice falls on the defendant. Id.

As explained below, the trial court's jury instructions were sufficient to ensure that the right to unanimity was preserved, so no constitutional error occurred. Pierce has not made a showing that lack of a more explicit unanimity instruction had practical and identifiable consequences in the trial of his case. This Court should therefore decline to allow Pierce to raise the issue for the first time on appeal.

Even if this Court reaches the merits of the claim, it should conclude that no error occurred. The defendants rely on State v. Lamar, supra, for the contention that the requirement of shared deliberations is violated if the trial court must give an instruction

beyond WPIC 1.04 to more specifically instruct the jury that deliberations must involve all 12 jurors at all times. However, they overlook the fact that Lamar resolves that issue against them.

In Lamar, the instructions given to the original 12 jurors included WPIC 1.04.² Lamar, 180 Wn.2d at 580. During deliberations, one of the jurors was replaced with an alternate, and the trial court instructed the reconstituted jury that the 11 remaining original jurors should bring the alternate “up to speed” as to what had already occurred and the jury should then resume its deliberations from there. Id. at 579. On appeal, Lamar challenged the trial court’s failure to instruct the reconstituted jury that it must begin deliberations anew as required by CrR 6.5. Id.

Our supreme court held that WPIC 1.04 properly instructed the original jurors “to deliberate together in the constitutionally required manner,” but that a violation of the right to unanimity subsequently occurred when the trial court later contradicted that instruction by directing the reconstituted jury to deliberate together on only those aspects of the case not yet addressed by the original jurors. Id. at 585. The jurors in this case were instructed on their

² The Lamar opinion does not identify the relevant instruction as WPIC 1.04, but a comparison of WPIC 1.04 and the instruction given in Lamar confirms that the two are identical. Lamar, 180 Wn.2d at 580; WPIC 1.04.

duty to deliberate together in an effort to reach a unanimous verdict in exactly the same manner as the original 12 jurors in Lamar. Id. at 580. Unlike Lamar, the replacement of one juror with an alternate in this case occurred *before* deliberations began. The supreme court's ruling that Lamar's original jurors were properly instructed "to deliberate together in the constitutionally required manner" is therefore binding in this case. Lamar, 180 Wn.2d at 585.

The Lamar court's holding that WPIC 1.04 properly instructs a jury on the requirement of a unanimous verdict resulting from common deliberations makes good sense. WPIC 1.04 specifically instructs jurors that they must "discuss the case with one another," "deliberate in an effort to reach a unanimous verdict," and decide the case "only after you consider the evidence impartially with your fellow jurors." Such an instruction cannot reasonably be interpreted to permit jurors to split into small groups and divide the issues between them. The trial court was not required to give a more explicit instruction.

Even if there were some question as to the clarity or sufficiency of WPIC 1.04, the polling of the jury affirmatively indicates that the verdict was unanimous. Lamar, 180 Wn.2d at

587-88 (polling is evidence of jury unanimity unless "the record affirmatively shows a reason to seriously doubt that the right has been safeguarded").

C. CONCLUSION

Pierce's conviction should be affirmed.

DATED this 12th day of June, 2017.

Respectfully submitted,

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Today I directed electronic mail addressed to Marla Zink, the attorney for the appellant, at Marla@washapp.org, containing a copy of the Supplemental Brief of Respondent in State v. Karl Emerson Pierce, Cause No. 74363-5-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 13 day of June, 2017.

A handwritten signature in black ink, appearing to be "J. Zink", is written over a horizontal line.

Name:

Done in Seattle, Washington

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